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April 10, 1970

DEPARTMENT OF LAW OPINION NO. 70-10 (R-48)

REQUESTED BY: THE HONORABLE SAM LENA  
Arizona State Senator

- QUESTIONS:
1. What is "gainful employment", and who determines whether a member's employment during disability is for the primary purpose of rehabilitation under A.R.S. § 38-844.F?
  2. Can a member of the Public Safety Personnel Retirement System, who is receiving a temporary disability pension, simultaneously receive compensation under the Industrial Commission Act?
  3. What is the intent of A.R.S. § 38-849.C?

- ANSWERS:
1. See body of opinion.
  2. Yes.
  3. See body of opinion.

The answer to Question 1 requires an interpretation of the first sentence of A.R.S. § 38-844.F, which reads:

"F. A permanent disability pension shall be reduced in the period prior to his normal retirement date, if the member engages in any substantial gainful employment which is found by the board to be other than for the primary purpose of rehabilitation. . . ."

Whether a permanently disabled member of the Public Safety Personnel Retirement System is engaged in "substantial gainful employment" ultimately must be determined through an examination of the facts and circumstances of each individual case. We, therefore, must answer your question in the abstract.

The following general definitions of "substantial gainful occupation" and "substantial gainful activity" appear to be proper guidelines for determining whether a particular disabled member is engaged in or is able to engage in "substantial gainful employment".

The United States Sixth Circuit Court of Appeals in United States v. Gwin, 68 F.2d 124 (6th Cir. 1933), stated, at 126, that the meaning of "substantially gainful occupation" in Treasury Department Regulation 11 under the War Risk Insurance Act meant "substantial portion of the work of the world in regular competition with others".

The United States Eighth Circuit Court of Appeals in United States v. Cornell, 63 F.2d 180 (8th Cir. 1933), when considering the War Risk Insurance Act, stated at 181:

"'Substantially gainful occupation' as used in the definition means any occupation for which insured is by nature fitted or competent to follow which will enable him ordinarily to make a living for himself. [Citation]. The performing of some work does not in itself show that a party was not totally disabled. The test is the ability to work without serious peril to the life or health, or as said in United States v. Harth, . . . 'without the risk of substantially aggravating the ailment with which he is afflicted.'"

In United States v. Rice, 72 F.2d 676 (8th Cir. 1934), the court said, at 677, that the phrase "substantially gainful occupation" in Treasury Department Regulation 11 of the War Risk Insurance Act meant "an occupation that produces and gains a man a fair and decent living having regard to his station".

In Foster v. Ribicoff, 206 F.Supp. 99 (W.D.S.C. 1962), the court made the following statement about the Social Security Act, at 101:

"\* \* \* Therein the [Health, Education and Welfare] Department acknowledged that the concept of 'substantial gainful activity' is a

growing one which must be treated in each instance on the facts. The Department states on Page 43 of the hearings: 'Substantial gainful activity means the performance of substantial services with reasonable regularity in some competitive employment or self-employment. It relates to the range of activities the individual can perform \* \* \* complete helplessness is not necessary to a finding of an allowable disability. Sporadic or infrequent activity would not necessarily establish ability to engage in substantial gainful activity.'

"The phrases 'inability to perform any substantial gainful activity' and 'total disability' are not synonymous." (Emphasis added.)

The responsibility for determining whether a member's employment during disability is for the primary purpose of rehabilitation rests upon the local Retirement Board of the member under A.R.S. § 38-847.

An answer to Question 2 requires reading together A.R.S. § 38-844.H and A.R.S. § 38-849.C. The portion of A.R.S. § 38-844.H pertinent hereto is:

"H. A member shall be eligible for a temporary disability pension if his employment is terminated prior to his normal retirement date by reason of temporary disability. Payment of a temporary disability pension shall commence as of the first day of the month coinciding with or next following the date of disability, but in no event prior to the expiration of a period during which the member is receiving compensation and sick leave payments. . . ." (Emphasis added.)

The portion of A.R.S. § 38-849.C pertinent hereto is:

"C. Any amounts which may be paid or payable under the provisions of any state workmen's compensation to a member or his beneficiaries on account of any disability or death shall be offset

against any benefits payable out of funds provided by the employers under the provisions of the system, on account of the same disability or death, but only to the extent that such other amounts are attributable to contributions by the employer. . . ."

The term "compensation" appearing in A.R.S. § 38-844.H is defined in A.R.S. § 38-842.6 as follows:

"6. 'Compensation' means the remuneration paid to an employee by the employers for personal services which are rendered during the period considered as service, as reported on the employee's federal income tax withholding statement (Form W-2)."

This definition of the term "compensation" excludes Workmen's Compensation from the limitation period in A.R.S. § 38-844.H.

A.R.S. § 38-849.C, in providing that Workmen's Compensation benefits shall be offset against any disability benefits payable out of funds provided by the employers under the Public Safety Personnel Retirement System, necessarily presupposes that Workmen's Compensation and Retirement System benefits can be paid simultaneously.

From the foregoing we conclude that a member of the Public Safety Personnel Retirement System who is receiving a temporary disability pension simultaneously can receive compensation under the Industrial Commission Act, but only to the extent provided in A.R.S. § 38-849.C.

Answering Question 3, we cite A.R.S. § 38-849.C, as follows:

"C. Any amounts which may be paid or payable under the provisions of any state workmen's compensation to a member or his beneficiaries on account of any disability or death shall be offset against any benefits payable out of funds provided by the employers under the provisions of the system, on account of the same disability or death, but only to the

extent that such other amounts are attributable to contributions by the employer. If the present value of the total commuted benefits under such workmen's compensation is less than the pension reserve on the benefits otherwise payable from funds provided by the employer under the system, then the present value of the commuted payments shall be deducted from the pension reserve and such benefits as may be provided by the pension reserve so reduced shall be payable under the provisions of the system. Any disability benefits payable out of funds provided by the employer under the system to a member or his beneficiaries shall be reduced by the amount paid such member or his beneficiaries under any law of the United States providing a pension or compensation for such disability, but the United States government insurance benefits for which the member has paid premiums shall not be considered to be a pension or compensation. The provisions of this section shall not apply in the case of social security benefits."

A.R.S. § 38-849.C specifies the limits applicable to the amount of benefits which a disabled member or a deceased member's beneficiaries may receive under the Public Safety Personnel Retirement System (a) in the event State Workmen's Compensation benefits are paid or are payable in connection with the disability or death of the member, or (b) in the event disability benefits are payable to a member or his beneficiaries under any law of the United States providing a pension or compensation for a disability.

The limits specified in A.R.S. § 38-849.C apply only to benefits payable from funds provided by the employer of the disabled or deceased member of the Public Safety Personnel Retirement System. The limits do not apply to benefits payable under United States Government insurance for which the member has paid premiums. The limits do not apply to Social Security benefits.

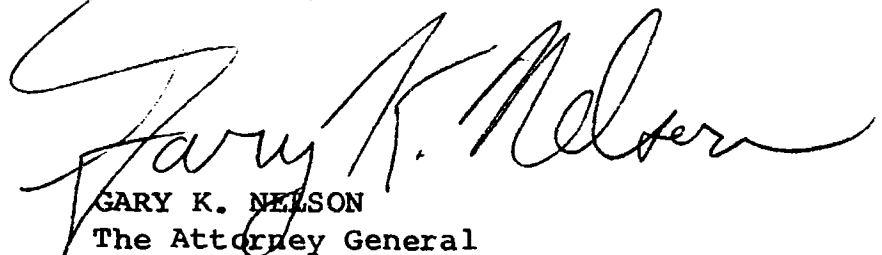
In the case of Workmen's Compensation payments, A.R.S. § 38-849.C establishes a formula whereunder a lump sum, representing the value of all of the Workmen's Compensation benefits to be received, is calculated mathematically, and then is compared to the reserve established by the actuary for the Arizona Public Safety Personnel Retirement System to provide funds for the payment of benefits under the Retirement System. If the sum representing the value of Workmen's Compensation payments is less than the sum representing the Retirement System pension reserve, then the sum representing the Workmen's Compensation payments is deducted from the Retirement System pension reserve, and the benefits payable under the Retirement System are based on the reduced pension reserve. The effect of the foregoing limitation and formula is that a disabled member or the beneficiaries of a deceased member of the Retirement System will receive at least the maximum benefits payable under the Retirement System. If the Workmen's Compensation payments are larger in amount than the benefits payable under the Retirement System, then the disabled member or a deceased member's beneficiaries would receive only the benefits under the Workmen's Compensation law. If, on the other hand, the benefits payable under the Workmen's Compensation law are less than the benefits payable under the Retirement System, then the disabled member or a deceased member's beneficiaries would receive the Workmen's Compensation payments plus the amount of benefits under the Retirement System which, when added to the benefits payable under the Workmen's Compensation law, would equal the maximum benefits payable under the Retirement System.

In the case of a pension or compensation for disability under any law of the United States, A.R.S. § 38-849.C provides that such amount shall be deducted from disability benefits payable under the Arizona Public Safety Personnel Retirement System. The effect of this provision is that a disabled member or his beneficiaries who receive a pension or compensation under any law of the United States will receive at least the maximum amount of disability benefits payable under the Retirement System. If the federal disability

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benefits are larger in amount than the Retirement System benefits, the disabled member or his beneficiaries would receive only the federal benefits. If, however, the federal disability benefits are less than the maximum Retirement System benefits, the disabled member or his beneficiaries would receive the federal disability benefits plus the sum equalling the difference between the Retirement System benefits and the federal disability benefits.

Respectfully submitted,



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The Attorney General

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